(27,429)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 674.

NORFOLK–SOUTHERN RAILROAD COMPANY, PETITIONER,

vs.

M. R. OWENS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Record from superior court of Tyrrell County	1	1
Summons	2	1
Sheriff's return	2	1
Return of justice of the peace	3	2
Finding of facts	4	3
Judgment	4	3
Judge's certificate	5	3
Clerk's certificate	5	3
Docket entries	6	4
Opinion	7	4
Judgment	11	6
Clerk's certificate	12	6
Writ of certiorari and return	13	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 17, 1920.

1 First District, Tyrrell County.

No. —.

M. F. OWENS

VS.

WALKER D. HINES, Director General of Railroads; NORFOLK-SOUTHERN RAILROAD COMPANY.

2 NORTH CAROLINA,
Tyrrell County, Columbia Township:

Before W. L. Godwin, Justice of the Peace.

M. F. OWENS

VS.

WALKER D. HINES, Director General of Railroads; NORFOLK-SOUTHERN RAILROAD COMPANY.

To the Sheriff of Tyrrell County, Greeting:

You are hereby commanded to summon the Norfolk Southern Railroad Co., if found in your county to appear and be before the undersigned Justice of the Peace of Tyrrell County at his office in Columbia Township (Court House) on Monday, June 24, 1918 at 9:30 A. M. to answer the complaint of the plaintiff for failure to transport goods from Ashboro, N. C., to Columbia, N. C. within a reasonable time as provided by the laws of North Carolina wherein he demands $40.00 and the value of the corn and costs of this action.

This June 15, 1918.

(Signed) W. L. GODWIN,
Justice of the Peace.

(Endorsed on back as follows:)

Received June 17th 1918. Served June 17th 1918 by reading and delivering a copy of the within summons to J. D. Cooper, Agent of the Norfolk Southern Railroad Company.

(Signed) JOS. E. REYNOLDS,
Sheriff.

3 NORTH CAROLINA,
Tyrrell County:

Justice's Court.

Before L. Godwin, J. P.

M. F. OWENS

VS.

NORFOLK SOUTHERN RAILROAD COMPANY.

Returns to Notice of Appeal.

Pursuant to the notice of appeal given by the defendant in open Court, I, W. L. Godwin, the Justice before whom this action was tried do hereby make the following returns to the Notice of Appeal.

On the 17th of June, 1918, at the request of the plaintiff, I issued a summons against the defendant, returnable the 23rd day of June, 1918, at 9:30 o'clock A. M., which said summons is hereto attached. On the return day of the said Summons the plaintiff appeared for trial and was represented by his attorney H. L. Swain. The defendant entered a Special Appearance and moved to dismiss the action for defects appearing in the Summons and the returns of the Sheriff on the back thereof and particularly, among other things, that the said Summons was made returnable on Sunday and was served on one J. D. Cooper as agent of the Norfolk Southern Railroad Company after the act of Congress of March 21st, 1918 and other Federal Regulations issued regulating Carriers by the Federal Government. The motion was overruled and the defendant excepted. I proceeded to hear the evidence offered by the plaintiff and after hearing the evidence offered by the plaintiff I rendered judgement for the plaintiff and against the defendant for the sum of $43.50 and the cost of the action, $3.50 of the said amount being the value of the bushel of corn which plaintiff claimed to have been lost and $40.00 being for penalty. The defendant did not offer any evidence before me.

I herewith send all of the papers in the cause and certify that the defendant has paid me my fee of 30 cents for making these returns.

This the 28th day of June, 1918.

(Signed) W. L. GODWIN,
Justice of the Peace.

4 NORTH CAROLINA,
Tyrrell County:

Superior Court, April Term.

M. F. OWENS

VS.

WALKER D. HINES, Director General of Railroads; NORFOLK-SOUTHERN RAILROAD COMPANY.

Plaintiff moves to amend the summons to include Walker D. Hines, Director General of Railroads, motion objected to but allowed by the Court:

The Court finds the following facts: That the plaintiff delivered to the defendant carrier at Ashboro, in the County of Randolph, in the State of North Carolina, on the 27th. day of March 1918 three bags of seed corn, in separate bags, for shipment to the plaintiff at Columbia, in the County of Tyrrell, in the State of North Carolina; that two of the said seed bags were delivered to the plaintiff by the said carrier in the 16th day of April 1918; that carriage of said goods by the defendant railroad was entirley over its line and in the State of North Carolina, and there are between Ashboro and Columbia three intermediate points, allowance should be made accordance with the stature; that the distance between the said points is 285 miles.

Thereupon the Court finds that the plaintiff is entitled to recover the penalty in the sum twenty one dollars, ten dollars for the first day, one dollar for eleven succeeding days, after allowing two days at the initial and six days, for three intermediate points, as allowed by the statute.

The Court further finds that one of the bags of seed corn was lost in transit and never delivered to plaintiff, and the value of said bag was $3.50, which said amount of $3.50 defendant tendered payment in Court.

Upon the aforegoing facts the Court adjudges that the plaintiff have and recover of the defendant the sum of twenty one
5 dollars, with interest from the beginning of this term, together with the cost of this action to be taxed by the Clerk.

(Signed) W. A. DEVIN,
Judge.

To the aforegoing judgement the defendant excepts and appeals to the Supreme Court. Notice waived, by consent the facts found by the Court and the judgement will constitute the case on appeal. Appeal bond fixed in the sum of Twenty-five dollars.

(Signed) W. A. DEVIN,
Judge.

NORTH CAROLINA,
Tyrrell County:

I, W. N. Norman, Clerk of the Superior Court of Tyrrell County, State of North Carolina, hereby certify that the foregoing is a full,

true and perfect transcript of the record in a civil action pending in said Court, wherein M. F. Owens is plaintiff and Walker D. Hines, Director General of Railroads, Norfolk Southern Railroad Co., are defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office in Columbia on this 10th day of July, 1919.

(Signed) W. N. NORMAN,
Clerk of the Superior Court of Tyrrell County.

6 Supreme Court of North Carolina.

Docket entries: Transcript of appeal from Superior Court of Tyrrell County docketed August 6, 1919. Submitted on briefs of counsel under Rule 12 August 28, 1919. Opinion by Clark, C. J., rendered October 22, 1919, as follows—(Walker, J. dissenting but filing no dissenting opinion):

Supreme Court, Fall Term, 1919, Tyrrell.

#20.

7 NORTH CAROLINA,

M. F. OWENS

v.

WALKER D. HINES, Director General of Railroads, and NORFOLK SOUTHERN RAILROAD CO.

Appeal by Defendant from Devin, J., at April Term, 1919, of Tyrrell.

This was an action brought under Rev. 2632, before W. L. Godwin, J. P. to recover the penalty of $40.00 for delay in delivery of two bags of corn, and the value of one bag of corn lost in transit, shipped from Ashboro N, C. on March 27, 1918, and received at Columbia, N. C. on April 16, 1918. The evidence showed that three bags were shipped and only two received. On appeal from the Justice, in the Superior Court, His Honor allowed the plaintiff to make Walker D. Hines, Director General of Railroads, a party defendant, the action originally having been brought against the Norfolk Southern Railroad Company. The Superior Court rendered judgment for $21 as the penalty for 12 days negligent delay, the value of the corn lost having been paid into court by the defendant.

H. L. Swain; Aydlett, Simpson & Sawyer for Plaintiff.
Small, McLean, Bragaw & Rodman for Defendants.

CLARK, *C. J.*:

The plaintiff objects that there is no assignment of error. Rule 27 requires that the errors relied on should be assigned in the record and Rule 19 (2) of this court prescribes that the exceptions which

are relied upon shall be grouped, numbered and set out immediately after the statement of the case on appeal under penalty of dismissal, if this is not done. This is a very necessary requirement, as this court has repeatedly stated and it must be strictly adhered to. Jones v. R. R. 153 N. C. 419, and citations thereto in the Anno. Ed. But there is an exception when the appeal is upon the ground that the judgment was not justified by the facts found, or admitted, or that the Court did not have jurisdiction. In such case the appeal of itself is an exception.

8 The Court found the following facts by consent: The plaintiff delivered to the defendant carrier at Ashboro N. C. 27th of March, 1918, three bags of seed corn for shipment to plaintiff at Columbia, N. C.; two of these said bags were delivered to plaintiff on 16th of April, 1918; the carriage of said goods by the defendant R. R. was entirely over its line and in the State of North Carolina, and there being between Ashboro and Columbia three intermediate points allowance should be made therefor in accordance with the statute; that the distance between the initial point and the point of delivery is 285 miles. Thereupon the Court adjudged that the plaintiff was entitled to recover the penalty of $21.00, i. e. $10 for the first day, $1 for 11 succeeding days, after allowing two days at the initial and six days for the three intermediate points as provided by statute. The Court further finds that one of the bags of seed was lost in transit, that its value was $3.50 which the defendant has paid; and rendered judgment for $21 with interest from the first day of the term and the costs.

The transcript shows an exception to the order making Walker D. Hines, Director General of Railroads, an additional party defendant, and the appeal from the judgment presents the validity of the judgment for the recovery of the penalty prescribed by the statute.

The U. S. Supreme Court in R. R. v. North Dakota, 39 S. C. Reporter 502, in an opinion by Chief Justice White, filed 2nd of June, 1919, held that under the Act of March 21, 1918, sec. 10 authorizing the president to fix rates for railroads under Federal control, but providing for review by the Interstate Commerce Commission and section 15, declaring that "nothing in the Act shall be construed to impair lawful police regulations of the State," the President has power to prescribe intra-state rates for railroads under Federal control, tho such rates shall conflict with the rates previously fixed by State authority.

Our Rev. 2632 provides that in shipment of less than a carload there shall be a penalty of $10. for the first day's delay and a dollar per day for each succeeding day shall be allowed. In this case there was a delay for 20 days. After deducting the exemption of 8 days as properly allowed by the Judge there was a net delay of 12 days, the penalty for which is $21. as correctly stated by the Judge. This was an intrastate shipment and this Court has held that Rev. 2632 is a valid law. Davis v. R. R. 147 N. C. 68; Wall v. R. R. Ib. 407.

9 The statute prescribing such penalty for delay was a police regulation and section 15 of the Act of March 21, 1918, as recited by Chief Justice White in R. R. v. North Dakota, supra de-

clared that "nothing in that Act should be construed to impair lawful police regulations of the State." This was the view taken by the U. S. Railroad Administration for in General Order No. 50-A, January 11, 1919, it is provided: "General Order No. 50, issued October 28, 1918, is hereby amended to read as follows: It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

It seems clear from this order that the Director General of Railroads did not assume to repeal the State police regulation fixing a penalty for delay in the transportation of freight between two points in this State, but only directed that he should be made a party defendant in other actions brought against any railroad company and he provided: "This order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures." He thus recognized as Chief Justice White has stated, that the police regulations were not impaired by the Federal statute, but provided that he should be exempt from being made a party to the suits therefor.

When this action was instituted a part of the recovery
10 sought was payment for the bag of corn not delivered. He was therefore to that extent a proper party to the action, and the exception to the amendment making him a party was properly overruled, but the judgment stands good as to the defendant railroad company for the penalty imposed by the statute.

Affirmed.

Walker, J. dissents.

11 Supreme Court of North Carolina, Fall Term, 1919, Tyrrell Co.

#20.

M. F. OWENS

vs.

WALKER D. HINES, Director General of Railroads, and NORFOLK SOUTHERN RAILROAD COMPANY.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Tyrrell County; upon consideration

whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the Judgment be affirmed.

And it is considered and adjudged further, that the defendants, W. D. Hines, Director General of Railroads and Norfolk-Southern Railroad Company, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Thirteen 10/100 dollars ($13.10), and execution issue therefor.

12 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of appeal in the case lately pending in said Court wherein M. F. Owens is plaintiff and Walker D. Hines, Director General of Railroads and Norfolk-Southern Railroad Co., are defendants.

Witness my hand and seal of said Court at office in Raleigh this 10 January 1920.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court.

In the Supreme Court of the United States, October Term, 1919.

NORFOLK SOUTHERN RAILROAD COMPANY, Petitioner,

vs.

M. F. OWENS, Respondent.

The writ of certiorari in the above entitled case having been granted to the above entitled petitioner to review the judgment and decision of the Supreme Court of North Carolina in the above case, in which M. F. Owens was plaintiff and Norfolk Southern Railroad Company and others were defendants.

It is now stipulated and agreed between counsel for the above named petitioner and counsel for the above named respondent that the transcript of record of the said Supreme Court of North Carolina in said cause, now on file in the Supreme Court of the United States, be taken as a return to said writ, and that the Clerk of the Supreme Court of North Carolina forward a certified copy of this stipulation to the Clerk of the Supreme Court of the United States forthwith, as a return to the said writ of certiorari.

This fifth day of April.

W. B. RODMAN,
Counsel for Above Named Petitioner.
AYDLETT & SAWYER,
Counsel for Above Named Respondent.

Supreme Court of North Carolina.

Filed in office April 9, 1920.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

Supreme Court of the State of North Carolina.

Clerk's Office,
Raleigh, North Carolina, April 9, 1920.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original in our file in this office.

Witness my signature and the seal of said Court hereto affixed, this the day and year above written.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Being informed that there is now pending before you a suit in which Norfolk-Southern Railroad Company is appellant, and M. R. Owens is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Superior Court of Tyrrell County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,429. Supreme Court of the United States, No. 674, October Term, 1919. Norfolk-Southern Railroad Company vs. M. R. Owens. Writ of Certiorari.

[Endorsed:] File No. 27,429. Supreme Court U. S., October Term, 1919. Term No. 674. Norfolk-Southern Railroad Company vs. M. R. Owens. Writ of certiorari and return. Filed April 12, 1920.

Supreme Court, U. S.
FILED
JAN 15 1920
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]223

NORFOLK-SOUTHERN RAILROAD COMPANY,
PETITIONER,

vs.

M. R. OWENS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA AND BRIEF IN SUPPORT OF PETITION.

W. B. RODMAN,
A. L. MACLEAN,
S. C. BRAGAN,
W. B. RODMAN, JR.,
Attorneys for Petitioner.

(27,429)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 674.

NORFOLK-SOUTHERN RAILROAD COMPANY,
PETITIONER,

vs.

M. R. OWENS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO BE DIRECTED TO THE SUPREME COURT OF NORTH CAROLINA.

Petitioner respectfully shows unto the court as follows:

(1) That this action was instituted before a justice of the peace in Tyrrell County, North Carolina, against the petitioner to recover the sum of forty dollars ($40.00) as a penalty for failure to transport a shipment in a reasonable time, as fixed by section 2632 of the Revisal of North Carolina.

(2) That said shipment was made at Ashboro, North Carolina, on March 27, 1918, and was delivered at Columbia, North Carolina, its destination, on April 16, 1918.

(3) That the possession, operation, and control of the property of the petitioner, Norfolk-Southern Railroad Company, was assumed December 31, 1917, by W. G. McAdoo, Director-General of Railroads, pursuant to the proclamation of the President of the United States, under the authority vested in him by the act of August 29, 1916, 39 Statutes, page 643, and by the act of March 21, 1918. That such use, control, possession, and operation of the properties of this petitioner existed on March 28, 1918, and has continued to exist to the present time.

(4) That on motion of the respondent the Director-General of Railroads was made party defendant; and judgment was rendered in the Superior Court of Tyrrell County, North Carolina, against the Director-General, for the penalty for failure to transport said shipment in a reasonable time. That upon appeal to the Supreme Court of North Carolina, the same being the court of last resort in North Carolina, it was held that the Director-General of Railroads was not liable for said penalty, but that petitioner, Norfolk-Southern Railroad Company, was liable for the penalty for failure to transport said shipment in the time fixed by the North Carolina statute, notwithstanding the fact that at the time said shipment was made the United States Government had exclusive control, use, possession, and operation of the property of petitioner.

(5) That the judgment of the Supreme Court of North Carolina holding that petitioner is liable for said penalty is erroneous, for the following reasons:

(*a*) It is contrary to and in violation of an act of Congress of March 21, 1918, entitled "An act to provide for the operation of transportation systems while under Federal control, for just compensation of their owners, and for other purposes."

(*b*) It deprives petitioner of its property as guaranteed to it by the Fifth Amendment to the Constitution of the United States of America.

(6) That petitioner attaches hereto, as Exhibit A, a duly certified copy of the record in said case, including the opinion and judgment of the Supreme Court of North Carolina, as filed October 22, 1919.

(7) Your petitioner avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons:

(*a*) Because the Supreme Court of North Carolina erred in holding that the petitioner, while its property was in the use, possession, operation, and control of the Director-General of Railroads, was liable for a penalty for failing to transport a shipment in intrastate commerce in a reasonable time as fixed by a North Carolina State statute.

(*b*) Because a decision on the question here presented is of great importance to shippers and railway corporations generally, and your petitioner is informed and believes that numerous other cases involving the same question are now pending in the courts of North Carolina.

(*c*) Because under the circumstances heretofore stated a full consideration of the case by this Court will tend to prevent costly and undesirable litigation, and promote justice to all interested.

(*d*) Because by the final judgment which has been rendered against your petitioner in the Supreme Court of North Carolina there is drawn in question a right, title, privilege, or immunity claimed under the Constitution, or a treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the right, title,

privilege, or immunity especially set up and claimed by your petitioner under such Constitution, treaty, statute, commission, or authority.

Wherefore, petitioner prays that this honorable Court grant its writ of certiorari, directed to the Supreme Court of the State of North Carolina, requiring that the record of said cause in said court and its judgment be certified to this Court, and that this honorable Court will thereupon proceed to correct the errors complained of, reverse said judgment, remand said cause, and give to your petitioner such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

W. B. RODMAN,
A. L. MACLEAN,
S. C. BRAGAN,
W. B. RODMAN, JR.,
Attorneys for Petitioner.

STATE OF VIRGINIA,
City of Norfolk:

J. C. Nelms, Jr., being first duly sworn, deposes and says: that he is Secretary of Norfolk-Southern Railroad Company, petitioner; that he has read the foregoing petition, and the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those, he believes it to be true.

J. C. NELMS, JR.,
Affiant.

Subscribed and sworn to before me, this 13th day of January, 1920.

[Seal of Augustus Winslow, Notary Public, Norfolk, Va.]

AUGUSTUS WINSLOW,
Notary Public.

My commission expires August 9, 1922.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

W. B. RODMAN,
W. B. RODMAN, JR.,
Of Counsel for Petitioner.

MEMORANDUM IN BEHALF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

NORFOLK-SOUTHERN RAILROAD COMPANY, *Petitioner,*

vs.

M. F. OWENS, *Respondent.*

Statement.

On March 27, 1918, respondent shipped three bags of corn from Ashboro, North Carolina, to Columbia, North Carolina. Respondent brought suit to recover a penalty for delay in delivering the shipment under the following North Carolina statute:

> "Section 2632. Failure to transport in reasonable time; reasonable time defined; forfeiture.—It shall be unlawful for any railroad company, steamboat company, express company, or other transportation company doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise, or articles of value received by it for shipment and billed to or from any place in the State of North Carolina, unless otherwise agreed upon between the company and the shipper or unless same be burned, stolen, or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities

there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day: *Provided*, the forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation it shall be considered that such transportation company has transported freight within reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at the initial point and 48 hours at one intermediate point for each 100 miles of distance or fraction thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable and shall be held to be *prima facie* reasonable, and a failure to transport within such time shall be held *prima facie* unreasonable. This section shall not be construed to refer only to delay in starting the freight from the station where it is received, but in addition thereto shall be construed to require the delivery at its destination within the time specified: *Provided, however*, that if said delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, upon establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved and discharged from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions brought under this section the burden of proof shall be upon the transportation company to show where the delay, if any, occurred."

At the time the shipment was made the property of the petitioner was under the control and being operated by the Director-General of Railroads, pursuant to the proclamation of the President made on December 26, 1917.

Judgment was entered in the trial court against petitioner for the penalty. On appeal to the Superior Court it was held that petitioner was not liable for the penalty, but that

the Director-General of Railroads was liable. On appeal to the Supreme Court of North Carolina, it held that petitioner was liable for the penalty and that the Director-General was not liable.

POINT I.

Is a common carrier liable to a penalty for failing to transport a shipment in a reasonable time when the United States is in the exclusive use, possession, control, and operation of the property of such carrier under the provisions of the "Federal Control Act" of March 21, 1918?

The Supreme Court of North Carolina held that as section 15 of the Federal Control Act of March 21, 1918 (40 Statutes L., 451; U. S. Comp. St., 1918, 3115¾*j*), provided that nothing in the act should be held to impair lawful police regulations and as the North Carolina statute fixing the penalty was a police regulation, and as the Director-General of Railroads had by general order 50-A assumed liability except in actions to recover a fine, penalty, or forfeiture, that therefore the carrier itself was liable for the acts of the Director-General which were in violation of a penalty statute.

That Congress had the right to authorize the President to assume control and operate the railroads is settled by the North Dakota Rate Case, 250 U. S., 135; 39 Sup. Ct., 502.

The rights and liabilities of the carrier are fixed by that act. The only portion of the act by which it can be contended that the carrier was made responsible for the acts of the Director-General is the first paragraph of section 10, which provides:

> "Sec. 10. (Carriers under Federal control—liabilities—suits by or against—new rates, charges, classifications, etc.) That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any

other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

That it was not the intention of Congress to make carriers pay out of the funds received by them as rental for their property judgments which might be rendered against a carrier by reason of a failure of the carrier, while in the possession of the Director-General, to perform duties and obligations to the public would seem clear from the care that Congress exercised in providing a fair rental to the carriers for the use of its property. Congress provided what deductions should be made from the rental for the use of the property of the carrier. In section 1 it is provided that the carrier shall assume and pay the war taxes and that all other taxes shall be charged as a part of the opening cost and charged against the Government. Again, in section 12 it is provided that the moneys and other property received from the operation of the carriers during Federal control become the property of the United States; and that disbursements therefrom shall be made in the same manner as prior to Federal control. It would seem clear, therefore, that by paragraph one of section 10 of the act, Congress only intended to forego its prerogative as a sovereign and to permit suits to be brought against it

for a breach of the duties it had assumed as a common carrier; and that the word "carriers" as used in section 10 designates not the railway corporation, but the agency appointed by the President to operate the transportation systems.

Rutherford *vs.* Union Pacific Railroad Company, 254 Federal, 880.

That this was the construction placed on the act by the Director-General would seem apparent from general orders No. 50 and 50-A.

Sagona *vs.* Pullman Company, 174 N. Y. S., 536.
Nash *vs.* Southern Pacific R. R. Co., 260 Fed., 280.
Mardis *vs.* Hines, 258 Fed., 945.
Hatcher & Snyder *vs.* Atchison, T. & S. F. Ry. Co., 258 Fed., 952.
Haubert *vs.* Baltimore & Ohio R. R. Co., 259 Fed., 361.
Schumacher *vs.* Pennsylvania R. R. Co., 175 N. Y. S., 84.

To hold that Congress intended to make the railway corporations liable to an individual for some default of the carrier while in the possession of the Government would constitute a taking of private property without just compensation and due process of law as guaranteed by the Fifth Amendment.

Donaldson *vs.* Henning, 4 Alaska, 642.
Atlantic Coast Line R. R. Co. *vs.* Riverside Mills, 219 U. S., 186.

Respectfully submitted,

W. B. RODMAN.
A. L. MacLEAN.
S. C. BRAGAW.
W. B. RODMAN, Jr.

Office Supreme Court, U. S.
FILED
FEB 2 1921
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 223.

NORFOLK SOUTHERN RAILROAD COMPANY,
PETITIONER,

vs.

M. F. OWENS.

BRIEF FOR PETITIONER.

W. B. RODMAN, JR.,
Of Counsel for Petitioner.

(27,429)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 223.

NORFOLK SOUTHERN RAILROAD COMPANY,
PETITIONER,

vs.

M. F. OWENS, RESPONDENT.

BRIEF FOR PETITIONER.

This case comes to this court by writ of certiorari to review a judgment of the Supreme Court of North Carolina entered in favor of respondent and against petitioner (fols. 6 and 7).

The opinion of the Supreme Court of North Carolina is reported — N. C., —; 100 S. E., 617 (Record, fols. 4-5).

Statement of the Case.

The possession, control, and operation of the property of the petitioner was taken by the Director General of Railroads

pursuant to the proclamation of the President of December 26, 1917. On March 27, 1918, while the property of the petitioner was under Federal control, the respondent shipped from Ashboro, N. C., to himself at Columbia, N. C., 3 bags of corn. This shipment was delivered to plaintiff on April 16, 1918. A North Carolina statute (Rev. 1908, sec. 2632) provides that it shall be unlawful for any railroad or transportation company to fail to transport a shipment in a reasonable time. The statute fixes what is a reasonable time and prescribes a penalty for failure to make delivery within the time so fixed. Respondent instituted suit to recover the sum of $40.00 as a penalty for failing to make delivery of the shipment in the statutory time. The Director General of Railroads was made a party defendant in the trial court, and judgment awarded in favor of plaintiff for the penalty. On appeal the Supreme Court of North Carolina held that the Railroad Administration was not liable for the penalty, but that the petitioner was liable, and entered judgment accordingly.

Specification of Errors.

The error relied upon is the judgment of the Supreme Court of North Carolina penalizing petitioner for failure to transport an intrastate shipment in the statutory time while its property was in the possession of the Director General of Railroads.

POINT 1.

A transportation company while under Federal control is not liable to a shipper for a penalty for failure to transport a shipment within a reasonable time and the judgment of

the Supreme Court of North Carolina in favor of respondent for the penalty was erroneous.

The right of the United States, under the war power, to seize and operate the railroads of the country is settled by the North Dakota Rate case (Northern Pacific Railway Co. *et al.*, State of North Dakota *ex rel.* Wm. Larger). The validity of the Federal Control Act is also fully established by the decision in that case.

Section 10 of the Federal Control Act (Com. Stat., 1918) provides:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process,

mesne or final, shall be levied against any property under such Federal control."

Does this section of the act impose a liability on the transportation company in its corporate capacity for a failure to properly perform the duties of a common carrier? If so, is the act constitutional?

The act did not provide for the supervision of the carriers and leave them free to carry on their duties, but the corporations which had theretofore acted as common carriers are deprived of all supervision of the transportation business; and by the provisions of section 11 it is made a misdemeanor for them to interfere in any manner with use or possession of any railroad property taken over by the President.

> "No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exercising the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt; the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplish-

> ment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing." North Dakota case, 250 U. S., 135.

Section 8 on the Federal Control Act provides that the President may designate the agencies through whom such control shall be exercised.

Who then are the CARRIERS that by section 10 are made subject to all laws and liabilities as common carriers?

As said by Justice Johnson in Gracie *et al. vs.* Palmer *et al.*, 8 Wheat., at p. 632:

> "The carrier may hire his vehicle, or his team, or his servant, for the purpose of transportation, or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only that he assumes the liabilities, and acquires the rights of a common carrier. So the ship owner, who lets his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case he parts with the possession to another and that other becomes the carrier; in the latter he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the charterer of a common carrier."

In determining whether Congress intended to make the corporation liable for the acts of the agency designated by the President or the agency itself liable, much light can be obtained by studying the provisions of the act with respect to

the payment to be made to the companies for the use of their property and the disposition of the funds received by the operating agency. We find that section one provides, that as just compensation for the use of the property the railway corporations are to be paid a sum equivalent to the average annual operating income for the three years ending June 30, 1917. This provision is in accordance with the statement of the President, issued in connection with his proclamation of December 26, 1917. Out of these funds the railway companies were to pay (*a*) war taxes, (*b*) assessments for public improvements, which were chargeable to investment in road and equipment, (*c*) taxes assessed prior to January 1, 1918.

The funds and property derived from the operation of the carriers were declared to be the property of the United States Government. Section 12 further provides:

> "Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December 27, 1917, are chargeable to operating expenses or railway tax accruals and for such other purposes in connection with Federal control as the President may direct."

Prior to Federal control judgments of the character obtained by respondent were chargeable to operating expense.

It would seem clear from the provisions quoted that the clear intention of Congress was to charge against the funds received by the Director General from operations all claims for failure of the agency designated by the President to prop-

erly operate and manage the rail lines, and that the corporation should receive clear the rental prescribed. If this were not true and it was intended that the railway corporation should answer in damages for the negligence of the employees of the Director General, it is conceivable that the railway corporations would be called upon to pay out more than they received from the Government, and the promise of the President made in his statement of December 26, 1917, that "Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems," is indeed an empty one.

The wording of the Federal Control Act shows that Congress intended to adopt the promises given by the President in his proclamation and statement when he assumed possession of the railroads. An interpretation, therefore, by the administrative department of the Government is entitled to more consideration than usual.

In recognition of the fact that the railway corporations were not liable for the acts of the Director General, we find in General Order No. 50, issued October 28, 1918, the following:

> "Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be

> brought directly against the said Director General of Railroads and not against said corporations."

The question of whether sections 10 and 15 prohibited the Director General from refusing to assume liability in actions to recover a penalty is not presented by this record. The sole question: Were the railway corporations made liable?

The courts, in discussing the question of the liability of the "carriers" have recognized the fact that the ultimate liability is that of the Railroad Administration.

Mardis *vs.* Hines, 254 Fed., 945.
Erie R. R. Co. *vs.* Caldwell, 264 Fed., 947.
Cravens *vs.* Hines, 218 S. W., 912.
Westbrook *vs.* Director General, 263 Fed., 211.
Castle *vs.* Southern Railway Company, 99 S. E., 846.
Hatcher & Snyder *vs.* A., T. & S. F. Ry. Co., 254 Fed., 952.
Schumacher *vs.* Penn. R. R., 175 N. Y. S., 84.
Hanbert *vs.* B. & O. R. R. Co., 259 Fed., 361.
Harmon *vs.* Hines, 101 S. E., 925.

In discussing the meaning of the word "carriers" as used in section 10 of the Federal Control Act, the court, in Rutherford *vs.* Union Pacific Ry. Co., 254 Fed., 880, said:

> "That part of section 10 of the act of March 21, 1918, on which the plaintiff relies does not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against such carriers and this referred to the 'carriers while under Federal control' mentioned in the first part of the section. It would have been an anomaly to have given the actual con-

trol of the railroad to the Director General and to have provided that suits arising out of his acts should be brought against the corporation, who had been divested of authority over those acts."

Justice Branson, in his dissenting opinion in McGregor *vs.* Great Northern R. R. Co., 172 N. W., 841, clearly establishes the proposition that the Director General and not the railway corporations are liable for defaults in the operation of the rail systems while under Federal control.

The suggestions found in some of the cases that while judgment may be had against the railway corporations the ultimate liability is that of the Railroad Administration (Johnson *vs.* McAdoo, 257 Fed., 757) cannot be urged as a reason for affirming the decision of the Supreme Court of North Carolina, because that court has expressly held that the Director General was not liable, and that judgment can be set up by the Railroad Administration in its final accounting against petitioner.

Congress itself has recognized in the Transportation Act of 1920 (act of February 28, 1920) that the railway corporations were not liable for damages sustained during the period of Federal control.

POINT 2.

It is respectfully submitted that the judgment brought up for review be reversed.

W. B. RODMAN, JR.,
Of Counsel for Petitioner.